No. 01-170

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

HAWKINS, SUPT , ET AL.,

Petitioners,

vs.

NEIBERGER, JAMES, ET AL ,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioners seek review of a decision of the Tenth Circuit affirming the district court's conclusion that, because Respondents adequately alleged that Petitioners instituted policies that violated Respondents' clearly established constitutional rights, Petitioners are not entitled to dismissal on grounds of qualified immunity. *See* Pet. App. at 3-9.

Respondents, who are patients who have been involuntarily committed to a state mental hospital, sued Petitioners, who are the Director and Superintendent of the hospital, alleging inadequate care in their conditions of confinement. Specifically, Respondents alleged that, as a result of policies set by Petitioners, Respondents were misdiagnosed and refused appropriate treatment, repeatedly and unnecessarily restrained and secluded, deprived of physician-ordered, nutritionally adequate diets, subjected to dangerously unsafe conditions and punishment for lodging complaints about substandard conditions of confinement, denied participation in educational programs, disallowed contact with family members, and prevented from speaking with legal counsel. *See* Pet. App. at 6. Respondents further alleged that Petitioners were personally aware of these rights violations resulting from their policies.

Petitioners moved to dismiss the amended complaint on various grounds, including qualified immunity. The district court denied this aspect of Petitioners' motion to dismiss, first concluding that Respondents had sufficiently alleged that a constitutional right had been violated, and further determining that the right was clearly established. *See* Pet. App. at 38-39.

The district court rejected Petitioners' argument that Respondents were improperly relying on respondeat superior liability. Rather, the court concluded that

Respondents were alleging the direct liability of Petitioners as policymakers. Thus, Respondents' allegations that Petitioners set policies that (1) failed to provide adequate conditions, and (2) failed to address rights violations known to Petitioners satisfied the requirements of *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226 (10th Cir. 1999) (defendant who was in a position of authority, knew of particular assaults, and did nothing to prevent them, was liable under Section 1983). *See* Pet. App. at 39. *See also City of Canton v. Harris*, 489 U.S. 378, 392 (1989) (deliberate indifference, manifested by failure to properly train police officers, creates liability under Section 1983).

The Tenth Circuit affirmed the district court in an unpublished order and judgment, similarly assessing first whether a violation of a constitutional right had been alleged and second whether that right was clearly established. *See* Pet. App. at 4-5. The court concluded that the allegations in the complaint, if true, would constitute a violation of the right to reasonable care and safety in confinement conditions established in *Youngberg v. Romeo*, 457 U.S. 307 (1982). The court rejected Petitioners' allegations that their liability was premised on respondeat superior liability, noting that the complaint contained allegations that Petitioners personally knew of inadequate care and failed to remedy or prevent it. *See* Pet. App. at 9.

The court further concluded that the constitutional right at issue was sufficiently clear to place the Petitioners -- individuals who enjoyed high-ranking positions in health care administration -- on notice that their conduct constituted a violation of those rights. *See* Pet. App. at 8.

SUMMARY OF ARGUMENT

This case involves an uncontroversial application of settled law on qualified immunity. At most, Petitioners' arguments amount to an assertion that the Tenth Circuit Court of Appeals misapplied a correct statement of law to the facts of this case. Such contentions do not justify certiorari review. *See* Sup. Ct. R. 10. Petitioners have pointed to no conflict between the Tenth Circuit's statement of the law and a decision by any other court, nor have they asserted that this case involves an important question of federal law yet to be addressed by this Court. *See id.*

Further, there has been no misapplication of law here. The Tenth Circuit considered and responded to the parties' arguments, clearly stating the factual and legal bases for its conclusions. Accordingly, the petition should be denied.

ARGUMENT

I. AT MOST, PETITIONERS HAVE ASSERTED THAT THE TENTH CIRCUIT MISAPPLIED A CORRECT STATEMENT OF LAW

Petitioners seek certiorari review of the Tenth Circuit and district court's conclusion that Petitioners are not entitled to qualified immunity. Because the Tenth Circuit's decision correctly applies established principles of law in a manner consistent with the pronouncements of this Court and all other federal circuits, the Petition should be denied.

A. None of the Factors Arguing for Certiorari Review Is Present Here

Supreme Court Rule 10 states that a petition for writ of certiorari will be granted only for "compelling reasons." No such reasons have been presented here.

Rule 10(a) enumerates the considerations counseling for grant of a certiorari petition. Where review is sought of a decision by a federal court of appeals, as here, certiorari may be appropriate if that decision conflicts with a decision of another federal appellate court, conflicts with a decision of a state's highest court, and/or decides an important issue of federal law that has yet to be addressed by this Court. *See* Sup. Ct. R. 10(a).

Further, Rule 10 specifically provides that a petition is "rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." As discussed below, this is precisely Petitioners' contention: "This case presents an example of the misapplication of the qualified immunity analysis . . . ." Petition at 13. Petitioners point to no conflict between the Tenth Circuit's statement of the law governing this issue and the decision of any other court, nor do they suggest that this Court must address an unresolved issue of federal law. Accordingly, none of the factors counseling for certiorari review is present.

B. Petitioners Merely Disagree With the Tenth Circuit's Application of the Law

Petitioners concede that a person who has been involuntarily committed has a constitutional right to adequate food, shelter, clothing, and medical care. *See* Petition at 4; Pet. App. at 41 (citing *Youngberg v.*

Romeo, 457 U.S. 307 (1982)) (establishing the right of a person who has been involuntarily committed to receive appropriate care and treatment). Petitioners further agree that, once it is established that Respondents have alleged a violation of a constitutional right, the determinative inquiry is whether that right is clearly established. *See* Petition at 13-14.

On the question of whether the allegations are sufficient to establish violation of a constitutional right, Petitioners assert that their liability may not be premised on a theory of respondeat superior. This argument is a red herring. Respondents alleged direct, not vicarious, liability based on Petitioners' roles as policymakers. *See infra* Section II.B. Both lower courts analyzed the allegations as a claim of direct liability, dismissing Petitioners' respondeat superior argument as a straw man. *See* Pet. App. at 9, 39. Petitioners' quarrel is in essence with the lower courts' assessment that the allegations of the second amended complaint, if proved, would establish Petitioners' liability. This Court does not sit to correct such errors.

Neither does Petitioners' additional assertion of error -- that the law on this point was not clearly established -- merit certiorari review. Petitioners argue that the *Youngberg* decision left open the question of the exact scope of that due process right. *See* Petition at 4. Petitioners emphasize that *Youngberg* did not address the question whether mental health administrators could be held liable "based on their knowledge of consultant reports and general criticisms of treatment and conditions." Petition at 4. This mischaracterizes the basis for Respondents' claim and raises a fact issue that cannot be resolved in the context of a motion to dismiss.

Additionally, Petitioners have gone too far in arguing that an area of the law is "clearly established" only if a published decision addresses the specific facts of a subsequent case. A plaintiff need not present "an identical case to show that the law was clearly established," but need only establish that "the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Sutton*, 173 F.3d at 1226; *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (very conduct alleged need not have previously been held unlawful).[1]

Further, as the courts below concluded, in light of the state of the law in the Tenth Circuit and the fact that Petitioners occupied elevated positions in the field of health care administration, there is every reason to expect Petitioners to be aware of Respondents' rights under *Younger*. *See infra* Section II.C.

Petitioners also request that certiorari be granted because both of the courts below allegedly announced a new rule of substantive due process. *See* Petition at 11. This argument does not necessitate review because Petitioners fail to identify the new rule supposedly articulated by the lower courts. *See id.* More importantly, no new rule was stated in these decisions. Both the district court and the Tenth Circuit relied on

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[1] Petitioners urge that, if the Tenth Circuit considered the question of whether Petitioners were personally liable to be "close," then the law could not have been so clearly established so as to defeat qualified immunity. *See* Petition at 8. This argument is illogical. Whether allegations establish personal culpability and whether the substantive law in an area is clearly established are separate and distinct inquiries.

well-established precedent for statements of the law of due process.

Finally, Petitioners argue that the Tenth Circuit ignored precedent by deciding the question of qualified immunity prior to addressing whether Respondents had stated a claim for a violation of substantive due process. This argument is baseless. Both the district court and Tenth Circuit decisions clearly outline and follow the two-stage analysis mandated by *Tonkovich v. Kansas Bd. of Regents*, 222 F.3d 504, 516 (10th Cir. 1998).[2] *See also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Petitioners cite no language from either opinion suggesting that the courts departed from this approach.

In sum, none of the arguments raised by Petitioners is of the type meriting certiorari review by this Court.

II. THE TENTH CIRCUIT APPLIED THE LAW CORRECTLY

To overcome a claim of qualified immunity, a plaintiff must demonstrate first that the allegations of the complaint establish the violation of a statutory or constitutional right, and second that the right at issue was clearly established at the time of the violation. *See Tonkovich*, 159 F.3d at 516; *Harlow*, 457 U.S. at 818.

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[2] *See* Pet. App. at 4, 38-39. For example, the Tenth Circuit opinion states: "To accept a claim of qualified immunity, we must first decide whether the plaintiffs sufficiently alleged that the defendants violated a statutory or constitutional right, and if so, whether that right was clearly established and a reasonable person in the defendants' position would have known that his or her conduct violated that right." Pet. App. at 4.

As the district court and Tenth Circuit properly concluded, both prongs of this standard have been met here.

A. Respondents Have Alleged Violation of a Constitutional Right

Youngberg held that a committed individual "enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." *Youngberg*, 457 U.S. at 324. In their second amended complaint, Respondents alleged deprivations of constitutional liberty interests, deliberate indifference to known medical needs, and inappropriate treatment unrelated to the purposes for which Respondents were committed. *See* Opp. App., Second Amended Complaint ¶¶ 9-13; ¶ 20(c)-(d); ¶ 25; ¶¶ 27-28; ¶ 71. The regularity of physical assaults by staff and other inmates alleged in the complaint supports Respondents' claim that they have been and continue to be denied treatment in a safe and humane environment. *See id.* ¶ 15; ¶ 25(b); ¶ 32; ¶ 71. Respondents further allege depravation of the benefits of outside involvement of family members and of counsel. *See id.* ¶ 16; ¶ 20(f),(g); ¶ 32; ¶ 71; ¶ 82. Finally, given that Respondents are subjected to unwanted medication without adequate justification or documented medical need, the administration of medication cannot be constitutional. *See id.* ¶ 11; ¶ 20(a); ¶ 25; ¶ 32; ¶ 71; ¶ 83.

The district court and Tenth Circuit properly concluded that Respondents' allegations supported a claim for violation of their constitutional rights.

B. Respondents Have Alleged that Petitioners are Directly Liable by Virtue of their Roles as Policymakers

In a custodial situation, administrators may be held liable under Section 1983 if they exhibit deliberate indifference to the violation of constitutionally protected rights, that is, if they are aware of rights violations and fail to institute policies to address them. *See County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998); *Harris*, 489 U.S. at 392; *Sutton*, 173 F.3d at 1240.

> [W]hen the State takes a person into its custody, and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs -- *e.g.*, food, clothing, shelter, medical care, and reasonable safety -- it transgresses the substantive limits on state action set by the . . . Due Process Clause.

Lewis, 523 U.S. at 851 (alterations in original) (citing *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 199-200 (1989)).

Respondents have alleged more than sufficient facts to establish that Petitioners' policies resulted in rights violations, and that Petitioners failed to address

these rights violations, of which they were personally aware. As the district court stated:

> [Plaintiffs] allege that Mr. Hawkins has been and continues to be "personally aware of the conditions at CMHI-P and the inadequate medical and psychiatric care and treatment provided to the patients held at CMHI-P." . . . Plaintiffs further allege that Defendants have operated CMHI-P in a manner that consciously and systematically deprives Plaintiffs of appropriate care. . . . Plaintiffs allege that Mr. Toerber and Mr. Hawkins "had actual notice from planning documents developed and published by CMHI-P that the level of staffing in the forensic unit was not adequate . . . to provide the minimally adequate treatment guaranteed by the Constitution. Despite this knowledge, Defendants . . . failed to take reasonable actions to maintain sufficient levels of trained professional staff . . ." They go on to allege that Defendants Toerber and Hawkins subjected Plaintiffs to a pattern of substandard care, failed to secure the financial and human resources constitutionally necessary, and failed to investigate, intervene, or correct substandard care of which they had direct knowledge.

Pet. App. at 40. In light of these allegations, both the district court and the Tenth Circuit properly concluded that Respondents had sufficiently alleged that Petitioners were aware of and failed to address these violations. *See* Pet. App. at 9, 40-41.

Petitioners argue that the Tenth Circuit erred in agreeing with the district court that the complaint contained allegations sufficient to establish Petitioners' "personal participation" in the alleged violations. *See* Pet. at 6. Neither *Youngberg* nor its progeny supports Petitioners' contention that they must be shown to have personally committed the alleged violations. Respondents must prove only that a personal capacity defendant has violated law that "was clearly established at the time of the defendant's conduct." *Sawyer v. County of Creek*, 908 F.2d 663, 665-66 (10th Cir. 1990).

Petitioners argue, as they did below, that they cannot be held liable under a respondeat superior theory of liability because *Monell v. New York Dep't of Social Services*, 436 U.S. 658 (1978), makes such a theory invalid. However, both courts identified this argument as a red herring and concluded that Respondents are not raising respondeat superior arguments. Under *Monell*, respondeat superior liability is not available when the injury is inflicted solely by the individual employee. *Monell*, 436 U.S. at 691. In contrast, when the policies or customs of the employer cause the injury there is no need to rely on respondeat superior liability. *Id.* at 692 (if under "color of some official policy" employee violates another's constitutional rights, Section 1983 liability exists).

This class action raises objections to the policies and customs of CMHI-P and the administrators that oversee it -- it does not rest liability on the actions of one employee tortfeasor. Respondents do not allege that Petitioners are vicariously liable for the actions of others; rather, they assert direct liability for Petitioners' own actions in setting the policies and practices that resulted in the rights violations complained of here. The

Petitioners, in supervisory roles, need not have personally executed the day-to-day care of the patients to be held culpable for the policies that permitted substandard care. The "Tenth Circuit has clearly established that a supervisor may be individually liable for failing to adopt or implement policy or training of subordinates to prevent deprivations of constitutional rights." *Sutton*, 173 F.3d at 1241; *see also Lewis*, 523 U.S. at 851; *Harris*, 489 U.S. at 392.

The district court correctly concluded, and the Tenth Circuit properly affirmed, "that the well-pled allegations of the complaint, taken as true and construed in Plaintiffs' favor, implicate the personal fault of the individual Defendants and do not rely on respondeat superior liability." Pet. App. at 39.

C. Respondents' Constitutional Right to Conditions of Reasonable Care and Safety Is Clearly Established

Further, the courts below properly concluded that these rights are clearly established.

Government officials performing discretionary functions are not protected by the doctrine of qualified immunity when their actions violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow*, 457 U.S. at 818. The focus of the qualified immunity inquiry is the "objective reasonableness of the official's conduct in light of the legal rules that were established at the time the action was taken." *Tonkovich*, 159 F.3d at 516.

A number of decisions have defined the contours of the rights Respondents seek to protect in this action. *Youngberg* (decided in 1982) held that a committed

individual "enjoys constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." *Youngberg*, 457 U.S. at 324. These interests include the right "to function free from bodily restraints." *Id.* Thus, when a person is "institutionalized and wholly dependent upon the state," the state and state officials must provide "minimally adequate care and treatment." *Id.* at 317-19. In addition, by 1987, the law requiring personal security for inmates and patients in state hospitals was clearly established in the Tenth Circuit. *See Garrett v. Rader*, 831 F.2d 202, 205 (10th Cir. 1987). By 1988, the right to minimally adequate care and treatment clearly "encompassed rights of visitation and communication with persons outside the institution." *Walters v. Western State Hosp.*, 864 F.2d 695, 700 (10th Cir. 1988). Thus, "forcibly detaining a person without his consent and holding him incommunicado" implicates privacy and liberty interests in this jurisdiction. *Id.* at 699. Finally, the right to be free of unwanted antipsychotic medications absent a finding that Respondents are a danger to themselves or others and that the treatment is in their best interests also has been clearly established for some time. *See Washington v. Harper*, 494 U.S. 210, 227 (1990); *see also Riggins v. Nevada*, 504 U.S. 127, 135 (1992). In light of these decisions, Petitioners' conduct from at lest 1982 would be actionable.

Additionally, the Tenth Circuit concluded that, given their elevated positions in health care administration, Petitioners would have been aware of these rights:

> Both Toerber and Hawkins serve in high ranking positions within the health care administration in the state of Colorado. A reasonable person in such a position would know that committed individuals enjoy a constitutionally protected interest in conditions of reasonable care and safety, and that allowing or implementing policies resulting in the act alleged in the complaint would violate that interest. We therefore conclude that plaintiffs' constitutional rights were clearly established and that reasonable persons in defendants' positions should have and would have known that their conduct violated that right.

Pet. App. at 8.

In light of the numerous decisions establishing the contours of a confined individual's rights, and also taking into consideration the Petitioners' positions in the field of health care administration, the lower courts properly concluded that it was reasonable to expect Petitioners to be aware of these rights.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition.

Respectfully submitted,

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August 25, 20001

APPENDIX

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

Case No. 99-CV-2777

SECOND AMENDED COMPLAINT

JAMES NEIBERGER, DANFORD ELDRIDGE, PAUL GARDNER and TERENCE JACOBS,

Plaintiff,

v.

ROBERT HAWKINS, individually and in his official capacity as Superintendent of the Colorado Mental Health Institute at Pueblo; GARRY TOERBER, individually and in his official capacity as Associate Manager for the Office of Direct Services of the Department of Human Services; COLORADO DEPARTMENT OF HUMAN SERVICES; and COLORADO MENTAL HEALTH INSTITUTE AT PUEBLO,

Defendants.

Plaintiffs, on their own behalf and on behalf of all other persons similarly situated, by and through their attorneys, Steven W. Black and Stephanie Edinger of Holland & Hart LLP, Kathleen Mullen, Esq., and David

H. Miller of Miller Lane Killmer Greisen LLP, state their complaint against the defendants as follows:

III. PRELIMINARY STATEMENT

1. Plaintiffs are patients in the Forensic Institute at the Colorado Mental Health Institute at Pueblo ("CMHI-P"). Plaintiffs bring this action to challenge and obtain relief from a combination of hostile conditions and policies that prevent plaintiffs from obtaining appropriate medical and psychiatric care and treatment at the hospital, in violation of their common law, statutory and constitutional rights.

2. Through this action, plaintiffs seek a declaratory judgment that their rights are being violated and comprehensive injunctive and remedial relief to abate permanently the conditions causing the violations. Plaintiffs also seek compensatory damages on behalf of the individually-named plaintiffs.

IV. JURISDICTION

3. This action is brought pursuant to the Care and Treatment of the Mentally Ill Act, Section 27-10-101, C.R.S., *et seq.*; the Americans With Disabilities Act ("ADA"), 42 U.S.C. §§ 12101 to 12213; and 42 U.S.C. §§ 1983 and 1985.

4. The governmental immunity notices on behalf of the named plaintiffs were given on February 19, 1999, and therefore the 90-day waiting period prior to initiation of litigation has expired.

5. Venue is proper under C.R.C.P. 98, because several of the defendants are located in Denver.

V. THE PARTIES

A. Plaintiffs

6. The named plaintiffs are adult patients in the Forensic Institute of CMHI-P.

7. The class represented by the named plaintiffs is composed of adult patients who are now or will in the future be committed to the Forensic Institute at CMHI-P.

James Neiberger

8. James C. Neiberger was committed to CHMI-P in 1979 after being found not guilty by reason of insanity of criminal charges brought in the Boulder County District Court. Although Mr. Neiberger has evidenced no assaultive or dangerous behavior throughout his hospitalization, he has been confined in the medium- and maximum-security units at CHMI-P for most of his twenty years at the hospital. Mr. Neiberger has on various occasions been progressed to less restrictive units at the hospital, but inevitably he has been regressed back to maximum security because he raised issues about the conditions at the hospital or the appropriateness of the care and treatment afforded him and other patients.

9. Mr. Neiberger's chart reflects that he has not been progressed through the system because he has refused to participate in therapy inappropriate to his needs and because he asserts his rights by filing grievances or, at times, through litigation. Mr. Neiberger has in effect been punished and warehoused at the hospital in retaliation for the lawful exercise of his rights and because he has been unable to

form a therapeutic alliance with the forensic institute's staff due to the substantial substandard care offered to him. Although consultants have suggested securing an independent psychiatrist to evaluate and treat Mr. Neiberger, no such effort has been made to date.

10. Mr. Neiberger, like other patients in the forensic unit, has been subjected to a continuous pattern of substandard care. In addition to the acts and omissions alleged in ¶¶ 60-71, *infra*, Mr. Neiberger has been:

a. maintained in a maximum security unit without progression because of his refusal to be transferred to GW-5 and to participate in the DBT program;

b. subjected to unlawful interference with his mail and inadequate access to telephones;

c. denied his right to refuse treatment that is inappropriate for his needs and to file grievances concerning conditions which violate his rights;

d. deprived of a smoke-free environment as required by his medical condition;

e. retaliated against for exercising his constitutional rights of access to the courts in violation of his First, Fifth and Fourteenth Amendment rights;

f. deprived of a physician-ordered, nutritionally adequate vegetarian diet;

g. forced to reside in a filthy and unsafe environment; and

h. threatened with the use of involuntary psychotropic drugs when Mr. Neiberger was not dangerous to himself or others.

11. Treatment staff evaluations of Mr. Neiberger contain misdiagnoses of his current condition. Although treatment staff at times admit that Mr. Neiberger's Axis I diagnosis, paranoid delusions, is in full remission, at other times the treatment staff erroneously interpret his opposition to the substandard psychiatric care provided to him and other patients of the forensic institute as suspicious and paranoia.

12. In early 1999, Mr. Neiberger was transferred to maximum security unit F-1, without any explanation. Prior to that transfer, Mr. Neiberger had been maintained on maximum security unit F-2, based on his refusal to participate in generic group therapies, which he has completed several times already, his refusal to subject himself to the DBT program on GW-5, and his perceived "litigiousness." Mr. Neiberger has been deprived of privileges for questioning the validity or therapeutic value of such programs as DBT, the level system on F-2, and the "coping skills" group recently initiated on F-2.

13. Mr. Neiberger has been a vegetarian for a number of years, and has continuing problems getting his dietary needs met. CMHI-P has refused to allow

Mr. Neiberger to have soy products and other nutritional supplements to try to address his dietary needs. Although Mr. Neiberger has filed repeated complaints concerning this failure to meet his dietary needs, those complaints have largely been unresolved.

14. Mr. Neiberger's pursuit of his educational and vocational goals has been interfered with by CMHI-P staff. His writing materials, personal records, property and books have been confiscated on ward F-2. Mr. Neiberger was forced to discontinue an educational program because it allegedly conflicted with the ADL group, which was nothing more than a basic hygiene group. Mr. Neiberger, who maintains very high personal hygiene standards, had absolutely no need for such group therapy concerning hygiene issues.

15. During his twenty years of residency at the forensic institute, Mr. Neiberger has seen repeated occasions of staff verbally and physically abusing other patients, and he has at times been subjected to such unlawful behavior. This verbal and physical abuse creates an atmosphere of intimidation and fear. Mr. Neiberger, to avoid such confrontations with staff, has simply withdrawn as much as possible from interaction with them.

16. CMHI-P staff have interfered with Mr. Neiberger's visitation and involvement of his family in his care.

17. Mr. Neiberger was placed in seclusion when he was neither dangerous to himself or others based on a false allegation that he had encouraged a patient not to take his medication.

Danford Eldridge

18. Danford Eldridge was committed to CMHI-P in 1981 when he was found incompetent to proceed. In 1986, Mr. Eldridge was found not guilty by reason of insanity, but he was also committed to the Department of Corrections on an auxiliary charge. The DOC commitment was discharged on February 11, 1993.

19. CMHI-P psychiatrists have diagnosed Mr. Eldridge as suffering from a borderline personality disorder. However, he has also been found to be free of psychosis. Dr. Elissa Ball, in 1995, also found that his Axis I diagnoses were fully resolved. In late 1996 and early 1997, Mr. Eldridge was evaluated by independent psychiatrists who recommended that Mr. Eldridge be provided individual psychotherapy, a treatment modality that he had not been provided while a patient at CMHI-P. This recommendation was largely ignored until Judge Phillip Roan ordered the hospital to provide individual psychotherapy for Mr. Eldridge two to three times per week. Judge Roan also ordered CMHI-P to allow Mr. Eldridge to continue his college education so as to prepare himself for living in the community. Judge Roan specifically noted that Mr. Eldridge had been in the hospital for too long and that CMHI-P had done too little to assist him in progressing through the hospital and returning to the community. To date, however, Judge Roan's orders have largely been disregarded by CMHI-P staff, who have failed to provide the recommended individual psychotherapy and have continuously interfered with Mr. Eldridge's education.

20. Mr. Eldridge, like other patients in the forensic unit, has been subjected to a continuous pattern of substandard care. In addition to the acts and

omissions alleged in ¶¶ 60-71, *infra*, Mr. Eldridge has been:

i. continuously subjected to harassment by Dr. Clark Jennings, and other psychiatric staff, in an attempt to get Mr. Eldridge to take psychotropic medications;

j. penalized and retaliated against for refusing generic group therapy and other forms of treatment that are inappropriate or which are not designed to meet his individual needs;

k. repeatedly subjected to restraints and seclusion when he was neither dangerous to himself or others;

l. deprived of certain dietary needs, despite a specific dietary plan prescribed by a treating physician and appropriate medical care and treatment for diagnosed conditions;

m. penalized for alleged violations of policies or rules which were changed without notice or apparent justification;

n. prevented from conferring with legal counsel and maintaining possession of his legal files;

o. denied continuing relationships with members of his family; and

p. forced to reside in a filthy and unsafe environment.

Paul Gardner

21. Paul Gardner was committed to CMHI-P in 1978 after being found not guilty by reason of insanity of criminal charges brought in the Boulder County District Court. During Mr. Gardner's approximately twenty years at CMHI-P, all but about four years have been spent in maximum security, despite the fact that he has not been assaultive or otherwise dangerous to himself or others. His Axis I diagnosis, hallucinogen, alcohol and cannabis abuse, which was the basis for his involuntary commitment to the hospital in 1978, is in full remission. His psychotic symptoms described in his sanity examinations from 1978 have not reappeared for many years. There has been no need for anti-psychotic medications for over a decade. Mr. Gardner has never shown any symptoms of mood disorder, nor has he shown any suicidal or homicidal ideation or behavior.

22. Mr. Gardner has been misdiagnosed as suffering from paranoid and narcissistic personality traits as a result of his opposition to the lack of appropriate treatment and warehousing of patients at the state hospital. Because of his firm belief that the hospital has been simply incarcerating him without meaningful treatment since 1995, Mr. Gardner has refused to continue to participate in the generic group treatments prescribed for all patients in the Forensic Institute, regardless of their specific diagnoses. Prior to 1995, however, Mr. Gardner did cooperate with these generic treatment groups in the hopes that he would be progressed through the hospital and released. Currently, he is cooperative with staff, but unwilling to endure inappropriate treatment. In prior years, as a condition of

progressing from the maximum security unit to the medium security unit, however, Mr. Gardner was forced to endure a continuous pattern of demeaning and abusive treatment.

23. In 1995, Mr. Gardner was on a medium security ward, GW-10. He had resided on that ward for almost two years and had been granted supervised, off-ground privileges for approximately 18 months. He was fully compliant with the requirements of such privileges. However, at the time of Mr. Gardner's placement on GW-10, Dr. Elissa Ball was his treating physician. Dr. Ball treated Mr. Gardner in a belittling and a degrading manner. For example, in one staffing meeting with Mr. Gardner, Dr. Ball told him that she not only had the right to tell patients what they could and could not think, she had the moral obligation to do so. The totalitarian regime perpetrated by Dr. Ball was so intolerable that Mr. Gardner had no alternative other than to return to the maximum security unit rather than continue to be subjected to the DBT Program, which was inappropriate to meet his needs.

24. Since 1995, Mr. Gardner has resided on the maximum security ward, without incident. Although Mr. Gardner has requested for over a year to move to a lesser restrictive ward, the hospital staff refuses to progress him because he refuses to participate in the same generic group therapy sessions which are inappropriate to his needs and in which he previously participated for more than a decade.

25. Mr. Gardner, like other patients in the forensic unit, has been subjected to a continuous pattern of substandard care. In addition to the acts and

omissions alleged in ¶¶ 60-71, *infra*, Mr. Gardner has been:

a. subjected to verbal abuse and ridicule by physicians and other treatment staff;

b. forced to reside in a filthy and unsafe environment;

c. subjected to sexual harassment by another patient on repeated occasions which was not addressed by the treatment staff until Mr. Gardner wrote to the Director of the Department of Human Services;

d. prevented from sharing written materials with other patients when such materials challenge the adequacy of care provided at CMHI-P;

e. threatened with the use of involuntary psychotropic drugs when Mr. Gardner was not dangerous to himself or others;

f. subject to body searches by female staff, contrary to hospital policy, and other invasions of privacy by female staff; and

g. denied any meaningful or timely response to grievances filed in accordance with hospital rules.

Terence Jacobs

26. Terence Jacobs was committed to CMHI-P in 1985 after being found not guilty by reason of insanity of criminal charges brought in the El Paso County District Court. During most of his stay at CMHI-P, Mr. Jacobs has not posed any behavior management problem nor has he been assaultive to any person. Since December 1992, Mr. Jacobs has not been on any medication and his treating physicians have repeatedly found that his Axis I diagnosis, which caused him to be involuntarily committed to the state hospital in the first place, is in full remission. Mr. Jacobs, like other patients in the forensic unit, has been subjected to a continuous pattern of substandard care, including but not limited to the acts and omissions alleged in ¶¶ 60-71, *infra*.

27. Mr. Jacobs has had numerous conflicts with Dr. Elissa Ball, resulting in misdiagnosis of his condition, inappropriate treatment, and regression back to maximum security as a result of Mr. Jacobs' report of inappropriate sexual relations between a staff person and a patient on a ward supervised by Dr. Ball. In addition, Dr. Ball required Mr. Jacobs to participate in the DBT Skills Program, even though Mr. Jacobs was previously found not to meet the diagnostic criteria for that research program. Mr. Jacobs requested to be transferred to the maximum security ward, F-2, rather than remain on the ward controlled by Dr. Ball. When he was subsequently transferred back to GW-5 in 1996, Mr. Jacobs was again required to complete the DBT Program, despite Dr. Ball's finding in 1995 that he had already achieved a clear grasp of the DBT concepts.

28. The treating physicians on F-2 have made it a condition of Mr. Jacobs' progression to

lesser-restrictive units that he agree to return to GW-5. Given his experience with Dr. Ball and the acts of retaliation she has taken against him, Mr. Jacobs has been forced to decline to return to GW-5. As a result, Mr. Jacobs continues to be warehoused on the maximum security unit, despite the fact that there is no evidence that he is dangerous to himself or others.

29. Because he has challenged actions and inactions by hospital staff, Mr. Jacobs remains warehoused on the maximum security unit to this day, despite recent findings by Dr. David Johnson that Mr. Jacobs is pleasant, with no behavior problems, no conflicts with staff or peers, no evidence of psychosis or any form of mental illness. The reason he remains on the maximum security unit is that he is critical of the system of treatment at the hospital and, based upon his years of being warehoused and mistreated, mistrusts the system.

30. Despite the fact that at least one independent medical review of Mr. Jacobs has recommended that CMHI-P develop specific criteria by which Mr. Jacobs could demonstrate that he is no longer dangerous to himself or others and is thus eligible for progression through the system and release from the hospital, no such criteria have ever been developed.

31. Further, throughout Mr. Jacobs' stay in the forensic unit, the hospital has not had a grievance system which fairly and thoroughly investigates patient grievances and resolves them. Rather, grievances filed by Mr. Jacobs and others, including the other named plaintiffs, are either totally ignored or not responded to, or found to be without merit, without fair and complete evaluations of the grievances.

32. Mr. Jacobs, like other patients in the Forensic Institute, has been subjected to a continuous pattern of substandard care. In addition to the acts and omissions alleged in ¶¶ 60-71, *infra*, Mr. Jacobs has been:

a. subjected to coercive treatment as well as threatened with involuntary psychotropic medications in response to his report of the improper sexual contact between a female staff person and one of the patients in GW-5;

b. subjected to unlawful interference with his mail;

c. placed in seclusion for challenging inappropriate treatment;

d. subject to unlawful "pat-frisk" by female staff;

e. unlawfully maintained in a maximum-security unit without progress because he challenged inappropriate treatment on GW-5 and refused to return to such unit; and

f. subjected to an unsafe environment with a patient who had previously threatened him.

B. Defendants

33. Robert Hawkins is the Superintendent of the Colorado Mental Health Institute at Pueblo and thus is responsible for ensuring that CMHI-P provides

medical and psychiatric care and treatment consistent with the standards set forth in the Colorado Care and Treatment of the Mentally Ill Act, the ADA, and in accordance with the patients' constitutional rights. Defendant Hawkins is also responsible for making the determination whether NGRI patients are released or maintained under involuntary commitment at CMHI-P. Defendant Hawkins has been and continues to be personally aware of the conditions at CMHI-P and the lack of adequate medical and psychiatric care and treatment provided to the patients at CMHI-P. Defendant Hawkins resides in Pueblo County, Colorado.

34. The Colorado Department of Human Services ("DHS") is the agency of state government responsible for administering the state's psychiatric hospitals, including the Colorado Mental Health Institute at Pueblo, and thus is responsible for ensuring that patients at CMHI-P receive medical and psychiatric care and treatment consistent with the standards set forth in the Colorado Care and Treatment of the Mentally Ill Act, the ADA and in accordance with the patients' constitutional rights. The Colorado Department of Human Services administrative offices are located in the City and County of Denver, Colorado.

35. Defendant Garry Toerber is the Associate Manager for the Office of Direct Services of the Department of Human Services and is the Director of the state psychiatric hospitals at both Pueblo and Fort Logan. As Director of the state psychiatric hospitals, defendant Toerber is responsible for overseeing all aspects of the operations of the State's two psychiatric hospitals and thus is responsible for ensuring that all patients at CMHI-P receive medical and psychiatric care and treatment consistent with the standards set forth in

the Colorado Care and Treatment of the Mentally Ill Act, the ADA, and in accordance with the patients' constitutional rights. Defendant Toerber is personally aware of the conditions at CMHI-P and the inadequate medical and psychiatric care and treatment provided to the patients held at CMHI-P. Defendant Toerber also has been intimately involved in recommending staffing and appropriation levels for CMHI-P. Defendant Toerber's offices are located in the City and County of Denver, Colorado.

36. Defendant Colorado Mental Health Institute at Pueblo (CMHI-P) is a state hospital (operated under the direction of the Department of Human Service, Division of Mental Health Services) and is required by law to provide its patients with medical and psychiatric care and treatment in compliance with the standards set forth in the Colorado Care and Treatment of the Mentally Ill Act, the ADA, and their rights under the Colorado and United States Constitutions. CMHI-P is located in Pueblo, Colorado.

VI. CLASS ACTION ALLEGATIONS

37. Plaintiffs bring this action pursuant to C.R.C.P.23(a), (b)(1) and (b)(2) on their own behalf and on behalf of the class of adult patients who are now or in the future will be committed to the forensic unit of CMHI-P.

38. As the Forensic Institute has 263 beds, and operates at or near capacity, the class consists of at least 263 patients and thus joinder of all patients is impractical.

39. This lawsuit raises questions of law and fact common to the class, including whether defendants

have failed to provide adequate medical and psychiatric care and treatment to members of the class in accordance with the Colorado Care and Treatment of the Mentally Ill Act, the Americans With Disabilities Act, and in accordance with the patients' state and federal constitutional rights.

40. The plaintiffs' claims are typical of the claims of the class, and plaintiffs and their counsel will thoroughly and adequately represent the interests of the class. Counsel for the plaintiff class have been counsel in numerous prior lawsuits involving similar issues.

41. The defendants have acted and refused to act on grounds generally applicable to the class. Final injunctive and declaratory relief is appropriate on a class-wide basis.

VII. FACTUAL ALLEGATIONS

42. Under Colorado law, persons committed to the Department of Institutions as a result of an insanity adjudication are entitled to the same quality of treatment available to a civilly-committed patient. Section 16-8-105, C.R.S.; *People v. Gilliland*, 769 P.2d 477 (Colo. 1989); *Romero v. Schauer*, 386 F. Supp 851 (D. Colo. 1974).

43. The Care and Treatment of the Mentally Ill Act is explicit about the rights of patients committed to state psychiatric hospitals with regard to both the conditions of their confinement and the treatment which they are entitled to receive. The purposes of the Act are:

a. To secure for each person who may be mentally ill such care and

treatment as will be suited to the needs of the person and to ensure that such care and treatment are skillfully and humanely administered with full respect for the person's dignity and personal integrity;

b. To deprive a person of his liberty for purposes of treatment or care only when less restrictive alternatives are unavailable and only when his safety or the safety of others is endangered;

c. To provide the fullest possible measure of privacy, dignity, and other rights to persons undergoing care and treatment for mental illness;

d. To encourage the use of voluntary rather than coercive measures to secure treatment and care for mental illness;

e. To provide appropriate information to family members concerning the location and fact of admission of mentally ill persons to inpatient or residential care and treatment;

f. To encourage the appropriate participation of family members in the care and treatment of a mentally ill person and, when appropriate, to provide information to family members in order to facilitate such participation.

Section 27-10-101(1), C.R.S.

44. Patients committed to a mental health facility have specific rights under the Act, including, most importantly, the right to "medical and psychiatric care and treatment . . . suited to meet [their] individual needs, delivered in such a way as to keep [them] in the least restrictive environment, and delivered in such a way as to include the opportunity for participation of family members in [their] program of care and treatment when appropriate, . . ." Section 27-10-116(1)(a), C.R.S.

45. As a designated facility, Defendant CMHI-P is responsible for assuring the formulation and implementation of an individualized, integrated, comprehensive written service plan designed with the purpose of promoting the patient's highest possible level of independent functioning and to reduce the likelihood of re-hospitalization or return to restrictive confinement. 2 C.C.R. 502-1, § 111A.

46. The services plan must be based upon the plaintiff's individually assessed clinical and other relevant needs, including the patient's presenting problems, physical health, emotional status, behavior and support system in the community; must contain specific goals and objectives, which are written in measurable terms and include expected dates of achievement and specific criteria to be met for termination of treatment. 2 C.C.R. 502-1, §§ 111E and F.

47. The services plan and the implementation of the services plan must also include the services necessary to meet a patient's needs, including clinical treatment services, case management services, rehabilitative services, residential services, vocational

services and employment services. 2 C.C.R. 502-1, § 111G.

48. Finally, the services plan shall specify criteria for discharge, including provisions for transitional, after care, and follow-up services based on the needs of the patient. 2 C.C.R. 502-1, § 111H.

49. The Act also guarantees patients certain personal civil rights, including:

a. The right to send and receive sealed mail;

b. Access to private telephone conversations;

c. Frequent and convenient opportunities for visitation;

d. The right to keep and spend one's own money, to wear one's own clothes, and to keep and use one's own personal possessions.

Section 27-10-117(1), C.R.S.. Further, a patient also has the right to be informed of these rights, to assert grievances, to exercise these rights without reprisal, and to have access to advocates. *Id.*

50. The Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* was enacted by Congress in the exercise of its "power to enforce the Fourteenth Amendment" and was based upon findings that:

a. "Individuals with disabilities . . . have been . . . subjected to a history of

purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. §12101(a)(7);

b. "Despite some improvements, . . ." historically-imposed isolation and segregation "continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2);

c. "To isolate and segregate individuals with disabilities . . ." are "forms of discrimination against [them]." *Id.*

51. The Act declares as its purpose to "end discrimination faced day-to-day by people with disabilities." 42 U.S.C. § 12101(b)(4).

52. The Act, at Title II, prohibits discrimination by any public entity against any qualified individual with a disability and prohibits such an individual's exclusion from participation in or denial of the benefits of public services, programs or activities. 42 U.S.C. § 12131.

53. According to the implementing regulations promulgated in 1991 by the Attorney General of the United States, the Americans with Disabilities Act requires that: "A public entity shall administer services,

programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. §35.130(d).

54. The Act forbids affording to qualified individuals with disabilities or to any class of individuals with disabilities any aid, benefit or service

a. "which is not equal to that afforded to others," 28 C.F.R. § 35.130(b)(1)(ii);

b. which "is not as effective . . . to reach the same level of achievement," 28 C.F.R. § 35.130(b)(1)(iii);

c. which "is different or separate," 28 C.F.R. § 35.130(b)(1)(iv); or

d. which "otherwise limits [the individual] in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit or service." 28 C.F.R. § 35.130(1)(b)(vii).

55. According to the Attorney General's 1991 comments to the statutorily commissioned regulations: "the public entity must administer services, programs and activities in the most integrated setting appropriate to the needs of the individuals with disabilities, *i.e.*, in a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible." 28 C.F.R. at p.461 (1995 ed).

56. Under the Due Process Clause of the Fourteenth Amendment to the United States

Constitution, persons confined for treatment in a state psychiatric hospital also have certain substantive and procedural rights. These include conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests. *Youngberg v. Romero*, 457 U.S. 307, 324 (1982).

57. Accordingly, the State of Colorado has a duty to provide a reasonably safe, nonrestrictive environment, as well as adequate food, shelter, clothing, and medical care to the residents of CMHI-P. *Id.* Further, as patients at the hospital, plaintiffs are constitutionally entitled to minimally-adequate treatment, which means treatment that is "reasonable" in light of plaintiffs' liberty interests and freedom from unreasonable restraints. *Id.* at 322.

58. Minimally-adequate care and treatment does not mean mere custodial care. Instead, the Federal Constitution guarantees care which gives a patient a reasonable opportunity to be cured or to improve his or her condition. *Eckerhart v. Hensley*, 475 F. Supp 908, 914 (W.D. Mo. 1979).

59. Despite these clear statutory obligations and well-established rights guaranteed under the United States Constitution and under the Colorado Care and Treatment of the Mentally Ill Act, defendants have operated CMHI-P in a manner that consciously and systematically deprives plaintiffs of appropriate medical care and psychiatric treatment suited to meet their individual needs and delivered in such a way as to ensure the plaintiffs are kept in the least-restrictive environment possible.

60. According to consultant reports commissioned by defendant Colorado Department of Human Services, the forensic unit and CMHI-P was and continues to be:

- Persistently overcrowded and chronically understaffed, with significant nursing and physician shortages;

- Staffed with inexperienced persons who had, prior to the four suicides [in 1997-1998], little or no timely or consistent training in suicide prevention and the treatment of the severely mentally ill population served by the maximum-security unit, and who lacked the skills and knowledge necessary to appropriately evaluate and treat the patient population at the maximum-security unit; and

- Plagued by an environmental design and physical condition that is dreary,

dangerously unsafe, and
untherapeutic.

61. Surveys conducted by the Health Care Financing Administration likewise have found serious staffing and other deficiencies at CMHI-P which substantially limit the hospital's capacity to provide adequate care.

62. The lack of appropriate staffing, training, programming and therapeutic environment creates feelings of hopelessness among staff, as well as the patients, which, in turn, results in a warehousing of patients rather than appropriate treatment and increases the risk of suicide.

63. Since at least 1994, defendant Department of Human Services and CMHI-P administrators, including but not limited to defendants Toerber and Hawkins, had actual notice from planning documents developed and published by CMHI-P that the level of staffing in the forensic unit was not adequate to maintain the quality of care necessary to meet the statutory requirements of the Care and Treatment of the Mentally Ill Act or to provide the minimally adequate treatment guaranteed by the United States Constitution. Despite this knowledge, defendants, including defendants Toerber and Hawkins, failed to take reasonable actions to maintain sufficient levels of trained professional staff to ensure the actual delivery of the necessary psychiatric care and treatment necessarsy to treat the individualized needs of the patients at CMHI-P.

64. As a result of overcrowding and lack of trained staff, among other things, the forensic unit lacks the capacity to develop and implement plans of care and treatment which address and meet the individual needs

of the patients. Instead, CMHI-P staff emphasize control rather than treatment, and subject patients to inappropriate one -size-fits-all groups and other "treatment modalities" which more often than not are inappropriate for the individual needs of the patients.

65. Similarly, patients who do become stabilized psychiatrically are not discharged from the maximum-security unit to less secure units, because of overcrowding, under-staffing or unlawful criteria unrelated to the treatment needs of the patient, and thus patients cannot make progress through the hospital towards release into the community.

66. These conditions inevitably lead to hopelessness and despair among the patients and staff alike.

67. Staffing shortages, particularly the lack of trained psychiatrists and other mental health professionals, coupled with poor morale among state hospital employees, have continued unabated since the early 1990s and directly contributed to one or more of the recent suicides.

68. This blatant lack of appropriate treatment programs on the maximum-security unit is also the result of conscious policy by CMHI-P. Specifically, Section 4.2 of the Institute for Forensic Psychiatry Operations Manual states:

> The maximum-security unit is a specialized facility. While treatment programs are in place throughout the division, including maximum security, the fact remains that the maximum unit's chief function is crisis intervention and short-term treatment and

> evaluation. The less secure units place greater emphasis on the treatment needs of the long-term, chronically mentally-ill NGRI patients.

69. The problem, of course, is that there are significant numbers of NGRI patients, like plaintiffs, who are placed on the maximum-security unit and not appropriately moved to lesser-restrictive units when their condition and behavior warrant such move, and thus are subjected to a substandard treatment environment for a long period of time.

70. As defendant Toerber and his review team have specifically acknowledged,

> Patients who remain for lengthy stays on maximum security face situations that breed despondency and giving up, which magnifies the inherent risk that comes with serious mental illness.

71. In total disregard of plaintiffs' personal safety and physical and mental health, defendants, including defendants Toerber and Hawkins, have subjected plaintiffs to a continuous pattern of substandard care, as a result of defendants' lack of appropriate supervision of the agents and employees of CMHI-P, defendants' failure to secure the financial and human resources necessary to deliver the care required under the Care and Treatment Act or the Constitution of the United States, and defendants' failure to investigate, intervene and correct persistent patterns of substandard care at CMHI-P, of which defendants Toerber and Hawkins have direct knowledge. Such substandard care includes, but is not limited to, the following:

a. Plaintiffs are routinely misdiagnosed and subjected to treatment goals which are unresponsive to their current condition and not designed to meet their individual needs;

b. Plaintiffs are deprived of the benefits of appropriate family involvement in their treatment;

c. Plaintiffs are deprived of their liberty and "warehoused" for many years on a maximum-security unit rather than being progressed to lesser-restrictive units in appropriate circumstances;

d. Plaintiffs are belittled and punished rather than treated appropriately;

e. Plaintiffs are required as a condition of progression to a lesser-restrictive unit to submit to "treatment" groups which plaintiffs have previously completed one or more times or which are totally inappropriate for plaintiffs' individual needs;

f. Plaintiffs are retaliated against by being regressed to and maintained in a maximum-security unit for filing grievances or challenging inappropriate treatment;

g. Plaintiffs are improperly held in the maximum-security unit even though their condition and behavior warrant

progression through the system and eventual discharge;

h. Plaintiffs are improperly subjected to coercive treatment including forced psychotropic medications, seclusion, and/or restraints;

i. Plaintiffs are deprived of treatment in a safe and humane environment in which full respect is accorded the patient's dignity and personal integrity;

j. Plaintiffs are improperly denied the right to refuse treatment that is inappropriate for their needs and/or to file grievances concerning conditions which violate their rights;

k. Plaintiffs are provided ineffective and deliberately indifferent assistance of counsel in challenging the systematic violation of their patient rights;

l. Plaintiffs are improperly deprived of "privileges" which are in fact basic rights pursuant to an arbitrary "level system," or "treatment programs", such as the DBT program, which conditions privileges on subjective opinions by staff concerning the patient's cooperation or participation in inappropriate programs and other forms of treatment;

m. Plaintiffs are improperly forced as a condition of progression to lesser-restrictive environments to form "treatment alliances" with CMHI-P staff, who lack support training to serve as primary treaters or who themselves have histories of criminal behavior, violence or mental illness, or who abuse alcohol or drugs, and therefore are not appropriate persons to provide psychiatric treatment;

n. Plaintiffs are housed in a substandard physical environment, with inadequate supervision of other patients because of chronic under-staffing, some of whom are extremely psychiatrically ill or otherwise unstable, resulting in numerous physical assaults by staff and other patients;

o. Plaintiffs are improperly subjected to or threatened with the arbitrary use of seclusion or physical restraint where there is no immediate danger to staff or other reason to believe the patient's behavior will be severely disruptive;

p. Plaintiffs are denied their personal civil rights, including their rights to send and receive sealed mail, full and private access to telephones, access to counsel, visitation, possession of

personal property, and educational or vocational pursuits;

q. Plaintiffs are also subjected to substandard medical and/or dietary regimes;

r. Plaintiffs are segregated in more restrictive units for long periods of time without a clear plan for progression to lesser-restrictive units based upon criteria unrelated to the treatment needs of plaintiffs, including but not limited to plaintiffs' opposition to treatment in violation of the Care and Treatment of the Mentally Ill Act, the ADA, and Constitutional provisions; and

s. Plaintiffs are deprived of an objective and impartial process of evaluation to determine eligibility for progression through the system or release.

72. These deliberately indifferent actions and omissions by CMHI-P treatment and administrative staff, in combination with the systematic failures outlined above, have deprived plaintiffs of appropriate medical and psychiatric care and treatment, suited to meet their individual needs, and delivered in the least-restrictive environment possible, in violation of the Care and Treatment of the Mentally Ill Act, the ADA, and the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Americans with Disabilities Act.

73. Plaintiffs have suffered and continue to suffer irreparable harm from defendants' actions and inactions. Plaintiffs have no inadequate remedy at law to secure redress of their rights; monetary damages, while necessary, are by themselves inadequate. Accordingly, injunctive relief is necessary.

VIII. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
(Care and Treatment of the Mentally Ill Act)

74. Plaintiffs incorporate by reference all of the preceding allegations as if fully set forth herein.

75. Defendants, by their actions and inactions set forth above, have substantially violated rights of the plaintiffs secured by the Care and Treatment of the Mentally Ill Act, Section 27-10-101, C.R.S., *et seq.*, by:

a. Failing to provide medical and psychiatric evaluation, care and treatment suited to meet plaintiffs' individual needs, delivered in such a way as to keep plaintiffs in the least restrictive environment possible, and delivered in such a way as to include the opportunity for participation of family members in plaintiffs' program of care and treatment when appropriate;

b. Failing to develop and implement individualized treatment plans, incorporating appropriate individualized behavioral and psychoanalytical therapy aimed at.

progressing plaintiffs to lesser-restrictive environments and eventually returning plaintiffs to the community;

c. Failing properly to inform plaintiffs of the risks and benefits of psychotropic medication before seeking consent for specific therapies involving the use of medication;

d. Failing to follow required procedural safeguards for administering forced medication when consent is not given, and imposing involuntary medications when the patient is neither dangerous to himself or others;

e. Failing to house and care for patients in a safe and therapeutic environment;

f. Excessively using seclusion and physical restraint in circumstances where such methods are unwarranted and contrary to law;

g. Warehousing plaintiffs in maximum security units in retaliation for the lawful exercise of plaintiffs' rights to refuse treatment inappropriate for their needs, to challenge hospital practices and decisions, or to gain access to the courts in matters

involving plaintiffs' statutory and constitutional rights;

h. Regressing plaintiffs to maximum security units for arbitrary reasons and in retaliation for plaintiffs asserting their rights under the Care and Treatment of the Mentally Ill Act, the ADA, and the United State and Colorado Constitutions;

i. Depriving plaintiffs of their personal civil rights, including interference with mail, denial or unreasonable restriction of the right to counsel, denial of full and private access to telephone, interference with visitation, wrongful deprivation of personal property, interference with educational or vocational pursuits;

j. Improperly denying Plaintiffs the right to refuse treatment that is inappropriate for their needs;

k. Arbitrarily denying or ignoring patients' grievances without adequate investigation;

l. Conditioning basic patient rights on compliance with an arbitrary "level system" or program such as the "DBT" program which conditions patient rights on subjective and arbitrary opinions by staff concerning the patients' cooperation or participation in inappropriate

programs or other forms of treatment;

m. Conditioning patients' progression to lesser-restrictive environments on their forming "treatment alliances" with CMHI-P staff, who lack sufficient training to serve as primary treaters or who themselves have histories of criminal behavior, violence, or mental illness, or who abuse alcohol or drugs, and therefore are not appropriate persons to provide psychiatric treatment;

n. Subjecting Plaintiffs to belittling and/or abusive treatment by staff;

o. Depriving plaintiffs of basic human needs in such care areas as sanitation, personal safety, nutrition, medical care, and vocational programming necessary to prepare the plaintiffs to return to the community; and

p. Failing to provide NGRI patients with an objective and impartial evaluation to determine eligibility for progression through the system or release.

76. As a proximate result of the defendants' negligent policies, practices, acts and omissions, members of the plaintiff class have suffered, do suffer, and will continue to suffer immediate and irreparable injury, including physical, psychological and emotional injury. Plaintiffs' physical and psychological well being

continue to deteriorate during the course of their confinement under the policies and conditions described in this complaint.

77. The plaintiff class has no plain, adequate or complete remedy at law to address the wrongs described herein. Plaintiffs will continue to be irreparably injured by the policies, practices, procedures, acts and omissions of the defendants unless this Court grants the injunction relief that plaintiffs seek.

78. In addition, the individually-named plaintiffs seek and are entitled to receive compensatory damages for the physical injuries, pain and suffering, severe emotional distress, unlawful deprivation of liberty, degradation and deprivation of the quality of their lives, which are the direct and proximate results of defendants' negligent actions and omissions described herein. The individually-named plaintiffs are also entitled to special damages they have incurred as a result of the violation of their statutory rights.

SECOND CLAIM FOR RELIEF
(Due Process Clause of the Fourteenth Amendment)

79. Plaintiffs incorporate by reference all of the preceding allegations as if fully set forth herein.

80. By operating a state psychiatric hospital that is systematically and deliberately indifferent to the serious medical and psychiatric needs of patients, the defendants are violating plaintiffs' rights to minimally adequate treatment and freedom from undue restraint protected by the Due Process Clause of the Fourteenth Amendment.

81. Specifically, defendants have failed to provide each patient with an individualized treatment plan developed and implemented by appropriate professional persons, which would give the patients a reasonable opportunity to be cured or to improve his or her condition, including a reasonable plan of progression to return to the community. Defendants' deliberately indifferent manner of dealing with patients is a substantial departure from accepted standards of professional judgment.

82. Defendants have also substantially deprived the patients and their families of any meaningful opportunity to participate in that process.

83. In addition, defendants have unnecessarily restricted patients' liberty through excessive use of seclusion and physical restraint and/or confinement to restrictive units in a manner and for a period of time not consistent with the patients' treatment needs. Defendants have failed properly to inform patients of the risks and benefits of psychotropic medication before seeking consent to administer drugs. Defendants also have failed to provide and enforce adequate substantive and procedural requirements for instituting and continuing forced medication, seclusion and/or restraints when consent is not forthcoming.

84. Defendants have refused to provide appropriate treatment and related services in a humane, psychological and physical environment. Instead, the totality of policies and conditions over which the defendants preside are incompatible with contemporary standards of decency and unnecessarily and unreasonably deprive patients of their personal liberty, dignity, and privacy.

85. Additionally, plaintiffs have been deprived of basic human needs in core areas such as sanitation, personal safety, medical care.

86. These actions and omissions of the defendants have violated and continue to violate plaintiffs' rights guaranteed under the Fourteenth Amendment of the United States Constitution. The Defendants, by depriving plaintiffs of their rights guaranteed under the United States Constitution, have deprived and continue to deprive plaintiffs of their rights protected under 42 U.S.C. § 1983.

87. As a proximate result of the defendants' deliberately indifferent policies, practices, acts and omissions, members of the plaintiff class have suffered, do suffer, and will continue to suffer immediate and irreparable injury, including physical, psychological and emotional injury. Plaintiffs' physical and psychological well being continue to deteriorate during the course of their confinement under the policies and conditions described in this complaint.

88. Members of the plaintiff class have no plain, adequate or complete remedy at law to address the wrongs described herein. Plaintiffs will continue to be irreparably injured by the policies, practices, procedures, acts and omissions of the defendants unless this Court grants the injunctive relief that plaintiffs seek.

89. In addition, the individually-named plaintiffs are entitled to seek and receive compensatory damages for the physical injuries, pain and suffering, severe emotional distress, unlawful deprivation of liberty, degradation and deprivation of the quality of their lives, which they each have suffered as a result of defendants' deprivations of their constitutional rights.

under 42 U.S.C. § 1983. The individually-named plaintiffs are also entitled to special damages they have incurred as a result of defendants' violation of their constitutional rights.

THIRD CLAIM FOR RELIEF
(Americans with Disabilities Act)

90. Plaintiffs incorporate by reference all of the preceding allegations as if fully set forth herein.

91. The plaintiffs in this case are "qualified individuals" under the Americans with Disabilities Act in that they are all persons with either a mental impairment, a record of such impairment, or regarded as having such an impairment. 42 U.S.C. §§ 12102(2)(A)-(C).

92. Defendants, by their actions and omissions set forth above, have intentionally violated rights of the plaintiffs secured by Title II of the ADA, 42 U.S.C. § 12131, *et seq.*, and 28 C.F.R. Part 35 by:

a. Failing to provide public services, programs, and activities "in the most integrated setting appropriate to the needs of the qualified individual with disabilities," including "in a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible," as required by 42 U.S.C. § 12132 and 28 C.F.R. § 35.130(d);

b. Utilizing criteria or methods of administration that have the effect of defeating or substantially impairing

accomplishment of the objectives of the Colorado Mental Health Institute at Pueblo program with respect to plaintiffs. 28 C.F.R. § 35.130(b)(3)(ii);

c. Denying plaintiffs participation in integrated services and programs by failing to "make reasonable modifications in policies, practices and procedures, when the modifications are necessary to avoid discrimination on the basis of disability," as required by 28 C.F.R. § 35.130(b)(7) and by 28 C.F.R. § 35.105(a) and (b);

d. Failing to undertake a programmatic "self evaluation" of its current services, policies and practices in the Forensic Institute for programmatic discrimination and failing to make the necessary modifications required as a result of the self evaluation, as required by 28 C.F.R. § 35.105(a) and (b);

e. Denying plaintiffs the opportunity to participate in public services and programs that are as effective and meaningful as those delivered to others as prohibited by 28 C.F.R. § 35.130(b)(1)(iii);

f. Denying plaintiffs the opportunity to participate in public services and programs that are not separate or

different as required by 28 C.F.R. § 35.130(b)(2);

g. Unnecessarily excluding plaintiffs because of the alleged severity and/or type of their disabilities from fully and equally enjoying and using integrated, community based public services, programs, and activities, thereby providing different and separate benefits and services to plaintiffs than are provided to others, as prohibited by 28 C.F.R. § 35.130(b)(1)(iv); and

h. Otherwise limiting plaintiffs "in the enjoyment of any right, privilege, advantage and opportunity enjoyed by others receiving the aid, benefit or service" as prohibited by 28 C.F.R. § 35.130(b).

i. Retaliating against plaintiffs for opposing acts or omissions by defendants which are contrary to the provisions of the Act, as prohibited by 28 C.F.R. § 35.134.

93. These actions and/or omissions by defendants, in combination with the systematic failures outlined above, have deprived plaintiffs of their statutory right to be free from discrimination based upon disability in violation of the Americans with Disabilities Act.

94. Members of the plaintiff class have suffered and continue to suffer irreparable harm from defendants' actions and omissions. Plaintiffs have no

adequate remedy at law to secure redress of their rights; monetary damages, by themselves, are inadequate. Accordingly, injunctive relief is necessary.

95. The individually-named plaintiffs are entitled to seek and receive compensatory damages for the physical injuries, pain and suffering, severe emotional distress, unlawful deprivation of liberty, degradation and deprivation of the quality of their lives, which they each suffer as a direct and proximate result of defendants' violation of their rights under the Americans With Disabilities Act. The individually-named plaintiffs are also entitled to special damages they have incurred as a result of defendants' violation of their rights under the Americans With Disabilities Act.

FOURTH CLAIM FOR RELIEF
(Common Law Negligence)

96. Plaintiffs incorporate by reference all of the preceding allegations as if fully set forth herein.

97. The actions and omissions of defendants and their agents and employees, acting within the scope of their agency and employment at all relevant times, constitute a substantial breach of duties of care owed to the plaintiff class and to the individually-named plaintiffs to provide each of them with medical and psychiatric care and treatment suited to meet their individual needs, and delivered in such a way as to keep them in the least restrictive environment possible and to include the opportunity for participation of family members in their program of care and treatment, where appropriate.

98. In addition, defendants have breached and continue to breach their duties of care owed to the members of the plaintiff class and the individually-named

plaintiffs to provide each of them with the level and quality of medical and psychiatric care and treatment required under the Care and Treatment of the Mentally Ill Act, Section 27-10-101, C.R.S., *et seq.*, including but not limited to the specific requirements set forth in Sections 27-10-116(1)(a) and 27-10-117(1), and regulatory standards promulgated pursuant to the Act, which inform the common law standard of care.

99. As a direct and proximate result of defendants' negligent actions and omissions in breach of applicable duties of care, both the named plaintiffs and members of the plaintiff class have been denied and continue to be denied medical and psychiatric care and treatment necessary to meet their individual needs and provided in the least restrictive environment possible, which has caused the named plaintiffs to suffer physical, psychological and emotional injury.

100. Members of the plaintiff class have suffered and continue to suffer irreparable harm from defendants' negligent actions and omissions. Plaintiffs have an inadequate remedy at law to secure redress of their rights, and monetary damages, by themselves, are inadequate to assure provision of care consistent with the standards required for the class as a whole.

101. Each of the named plaintiffs is entitled to damages for the injuries and losses suffered by them including, but not limited to, physical injury, pain and suffering, severe emotional distress, unlawful deprivation of liberty, degradation and substantial impairment of the quality of their lives, in an amount to be determined at trial.

IX. PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court:

a. (a) Determine that plaintiffs may maintain this action as a class action pursuant to Colorado Rule of Civil Procedure 23.

b. (b) Declare that defendants have failed and continue to fail to provide appropriate medical and psychiatric care and treatment to plaintiffs in violation of the Care and Treatment of the Mentally Ill Act, Colorado Revised Statutes § 27-10-101, *et seq.*

c. (c) Declare that defendants have failed to provide plaintiffs with minimally adequate medical and psychiatric care and treatment, in a reasonably safe and non-restrictive environment, in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

d. (d) Declare that defendants have failed to provide plaintiffs with medical and psychiatric care and treatment which would give each patient a reasonable opportunity to be cured or to improve his or her condition, in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

e. (e) Declare that defendants have failed to provide plaintiffs with medical and psychiatric care and treatment in the most integrated setting appropriate to plaintiffs' individual needs, in violation of the Americans with Disabilities Act, 42 U.S.C.12131 and the implementing regulations at 28 C.F.R. Part 35.

f. (f) Enjoin defendants to actually provide to each member of the plaintiff class appropriate medical care

and psychiatric treatment necessary to meet their individual needs, in the least restrictive environment possible, including individualized treatment plans which detail appropriate behavioral and psychoanalytical therapies and a specific plan of progression by which each plaintiff can know what steps are necessary for him to be released, as well as implementation of such individual plans of care by qualified members of trained staff.

g. (g) Enjoin defendants from placing or maintaining any member of the plaintiff class in a more restrictive environment rather than an integrated setting appropriate to the needs of the each plaintiff or class member when such restrictive placement is a substantial departure from professional judgment.

h. (h) Mandate defendants to develop and implement a plan of correction, the contours of which shall be determined by the Court, to ensure that the violations of plaintiffs' Constitutional and statutory rights outlined herein are fully remedied, and that future care and treatment in the Forensic Institute of CMHI-P complies with the Colorado Care and Treatment of the Mentally Ill Act, the Americans with Disabilities Act, and the Colorado and United States Constitutions.

i. (i) Award the individually-named plaintiffs compensatory and special damages in amounts found by the jury at trial.

j. (j) Award plaintiffs their costs, expenses and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988 and 42 U.S.C. § 12205.

k. (k) Grant such other and further relief as the Court deems just and proper.

X. JURY DEMAND

Plaintiffs demand a trial by jury on all issues triable to a jury.

XI. CERTIFICATE OF REVIEW

Plaintiffs certify that plaintiffs' counsel have consulted with a forensic psychiatric, who has experience in the areas of the alleged negligent conduct and violations of 42 U.S.C. § 1983. The consulting psychiatrist has reviewed the available records, documents, and other information relevant to the allegations in plaintiffs' First Amended Complaint, and based upon review of such facts, the psychiatrist has concluded that plaintiffs' claims have substantial justification within the meaning of Section 13-17-102(4), C.R.S.

Respectfully submitted this _____ day of June, 1999.

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